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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 88.

Atlantic Coast Line Railroad Company,
Louisville and Nashville Railroad Company, and
Charleston & Western Carolina Railway Company,
Appellants,

vs.

The United States of America,
Interstate Commerce Commission, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

BRIEF FOR APPELLANTS.

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Wilmington, N. C.,
October 26, 1931.

J&B-14959

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BRIEF FOR APPELLANTS.

MAY IT PLEASE THE COURT:

This case is an appeal from an order of the Court below entered in the above entitled cause on the 9th day of March, 1931. The suit in which the appeal is taken was brought by Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company, and Charleston & Western Carolina Railway Company, as Plaintiffs, against the United States of America, Defendant, to enjoin, annul and set aside an order of the Interstate Commerce Commission entered on the 9th day of June, 1930, which requires

the Plaintiffs-Appellants to cancel certain restrictive schedules filed as amendments to joint tariffs theretofore filed with the Interstate Commerce Commission, because these restrictive schedules were held to be violative of certain conditions imposed by the Commission in the lease of the Clinchfield to Atlantic Coast Line and Louisville and Nashville. The Interstate Commerce Commission, Piedmont and Northern Railway Company, and Georgia and Florida Railway intervened as Defendants. The case was tried in the court below by three judges sitting as a District Court (U. S. C. Title 28, Sec. 47; C. 32, 38 Stat. 219, 220) and is here on a direct appeal from the order of that court refusing to enjoin the order of the Commission and dismissing the Bill of Complaint (U. S. C. Title 28, Sec. 345; C. 229, 43 Stat. 936, 938).

OPINION BELOW.

The opinion below is reported in 48 Fed. (2nd), p. 239.

JURISDICTION.

Jurisdiction of this Court to review on appeal the decree of the District Court entered in this case is as set out in Statement of Jurisdiction heretofore filed herein in accordance with Rule 12 of this Court.

STATEMENT OF THE CASE.

The Atlantic Coast Line owns 596,700 shares of the capital stock of the Louisville and Nashville, or about 51 per cent of the stock issued and outstanding. The Atlantic Coast Line controls the Louisville and Nashville by electing the Board of Directors of the latter, who in turn elect the officers (R. 23).

The Clinchfield Lease.

On July 20, 1923, Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company filed their application, under Paragraph 2 of Section 5 of the Interstate Commerce Act, for authority to acquire control by lease, for 999 years, of the property, rights and franchises of the Carolina, Clinchfield & Ohio Railway, and its subsidiaries, extending from Spartanburg, South Carolina, to Elkhorn City, Kentucky, a distance of 276.85 miles. A map showing the location of the railroads here involved was filed as Exhibit 2 with the bill in this case (R. 34-A). The Seaboard Air Line Railway Company, Georgia and Florida Railway, and Piedmont and Northern Railway Company intervened and opposed the granting of the lease. Hearing was had on the application and evidence introduced on September 24-29, 1923, inclusive (R. 69).

While the Commission was considering the matter, Chairman Hall, for the Commission, on February 9, 1924, addressed to all of the parties a letter suggesting ten conditions, and asking for a statement by the parties of their respective positions with reference thereto (R. 90). Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company filed their reply, which is made Exhibit 3 with the bill in this case, and set out in detail their position as to the various conditions (R. 35-67).

Of the ten conditions proposed by Chairman Hall, only five were subsequently adopted and imposed. Conditions 5, 6, 8, 9 and 10, as proposed by Chairman Hall, were eliminated. Conditions 1, 2, 3 and 4 were changed and adopted. Condition 7 was not objected to and was adopted and is now Condition 5. Condition

2, as adopted, deals with the proposed connection between the Clinchfield and Louisville and Nashville, and is not here involved. Condition 5 deals with the issuance of securities and is not here involved. The only conditions here involved are Conditions 1, 3 and 4 as adopted. The report and order of the Commission and the decision of the District Court here appealed from both turn on the proper construction to be placed on Conditions 3 and 4.

On June 3, 1924, the Commission, by its report and order in the Clinchfield lease case (R. 67-100), found that "the major public interest involved in the proposed acquisition and control of the Clinchfield lies in its utilization as a link in a new through route between the Southeast and the Northwest" (R. 83); that "because of its isolation and the policy of its connections in preferring their longer hauls by more circuitous routes, the Clinchfield is not rendering the service for which it was designed and of which it is capable;" and that "so long as it continues as an independent property its usefulness to the public will be circumscribed" (R. 89); and granted the application for control by lease of the Clinchfield as being in the public interest, subject to the five conditions referred to above and appearing in its report in the lease case (R. 91-92).

On the 16th day of October, 1924, Atlantic Coast Line Railroad Company and Louisville and Nashville Railroad Company, pursuant to the order of the Commission, jointly leased the property known as the Clinchfield, together with its rights and franchises, and proceeded to enter upon the operation of same in accordance with the terms of the lease.

No route existing at the time of the lease has been closed or attempted to be closed (R. 20).

In order to provide the new through route, which the Commission stated was "the major public interest involved" in the Clinchfield lease, the Charleston & Western Carolina has expended large sums of money for the purpose of putting its line in condition to move through traffic received by it from other lines of the Coast Line system (R. 17), and the Louisville and Nashville Railroad Company has completed the construction of the new line through the mountains of Southwestern Virginia, necessary to connect its line with that of the Clinchfield (R. 18). The estimated cost of this latter construction was shown in applicant's reply to Chairman Hall's letter to be at least $6,000,000.00.

The Georgia and Florida Extension.

In December, 1926, two years after the making of the Clinchfield lease, the Interstate Commerce Commission by its order entered in the matter of Reorganization and Extension of the Georgia and Florida Railway (117 I. C. C. 473), authorized the construction by the reorganized company, Georgia and Florida Railway, of an extension of its line of railroad from its northern terminus at Augusta, Georgia, to Greenwood, South Carolina, a distance of fifty-nine miles. This new line is known as the Greenwood Extension, and was first opened for operation June 1, 1929. At Greenwood, South Carolina, it connects with the Seaboard Air Line, the Charleston & Western Carolina and also with the Piedmont and Northern. The Pied-

mont and Northern is an electrically operated railroad extending in a northerly direction from Greenwood, South Carolina, to Spartanburg, South Carolina, a distance of eighty-nine miles, where, at the time of the lease, it connected and now connects with the Clinchfield (R. 17).

Prior to the opening of the Greenwood Extension, there were in existence and in constant use through routes between points in the Northwest and Southeast over the lines of the Clinchfield, Charleston & Western Carolina and Atlantic Coast Line for southbound movement, and also in the reverse direction. There was no direct line of railroad in existence between Augusta, Georgia, and Greenwood, South Carolina, except the line of the Charleston & Western Carolina, and the routes here involved over the extension were not then physically possible.

Prior to the opening of said Greenwood Extension, the Charleston & Western Carolina and the Coast Line and Louisville and Nashville as joint lessees of the Clinchfield Railroad, and those roads as joint lessees of the line known as Georgia Railroad, filed in applicable tariffs restrictive routing notes, to become effective on May 20, 1929, and later dates (R. 14), and designed to restrict the application of joint rates theretofore published, so that same should not become applicable over the newly constructed line of the Georgia and Florida when same should be opened for business on June 1, 1929, and so as to preserve the long-haul of appellants by preventing the diversion from their system lines of traffic which had theretofore been moving over said lines (R. 15).

The Order of the Commission and the Decree of the District Court in the Instant Case.

Upon protest filed by the Georgia and Florida and Piedmont and Northern, the Commission suspended the restrictive routing notes (R. 14), and after a hearing the Commission by the order here sought to be enjoined, and for the reason set out in its report, required the respondents there (appellants here) to cancel the restrictive notes, upon the ground that the same were in violation of Conditions 3 and 4 of the Clinchfield lease (R. 30-33).

The Commission found in this case, and the District Court approves the finding, that the railroads of the Clinchfield and the Charleston & Western Carolina were and are operated in conjunction and under common management or control with the railroad of the Atlantic Coast Line Railroad Company, and that to the extent that traffic may move over the Greenwood Extension and Piedmont and Northern to Spartanburg, and thence over the Clinchfield, and the reverse, the Charleston & Western Carolina will be short-hauled if the proposed restrictions are required to be cancelled (R. 26, 149-150). No question of undue circuity is involved (R. 17). No emergency exists.

The Commission in the instant case holds that the purpose of the conditions imposed by it in the lease case was "to preserve the relationships then existing between the Clinchfield, on the one hand, and the public and connecting lines of railroad, on the other hand, which were the relationships usually and normally existing between *independent railroads* and those whom it serves" (R. 28-29).

The District Court, in its opinion, holds that the purpose of the conditions was to require that the leased line be continued "as a neutral route and that in a case such as this roads handling through traffic passing over it were to be treated *just as though the lease were not in existence* and the Carolina, Clinchfield & Ohio were an entirely *independent road independently operated*" (R. 141.) (Italics ours.)

Both the Commission and the District Court base their decision on their construction of Conditions 3 and 4 of the Clinchfield lease case and hold that the conditions were intended to and did require the waiver of the provisions of Section 15 (4) of the Act and that acceptance of the lease with these conditions amounts to consent by the Atlantic Coast Line to the short-hauling of its system lines over routes thereafter to be established over a line of railroad not then in existence, and not now connecting with or reached by the line of the Clinchfield. Unless the acceptance of the lease subject to these conditions amounts to consent, there is no consent (R. 145-146).

The Court also held that although the failure of the Coast Line in 1926 to appear in the Georgia and Florida Reorganization Case and protest against the construction of the extension there authorized, does not estop the Coast Line from now asserting its rights; nevertheless, such failure to appear "is a pertinent matter for consideration in determining the meaning of the conditions under which the Carolina, Clinchfield & Ohio lease was approved" (R. 141); and that the order of the Commission in this case did not amount to the establishment of new through routes in a manner contrary to the provisions of Paragraph 3 of Section 15 of the Act.

SUMMARY OF ARGUMENT.

I.

The Conditions in the Clinchfield Lease Case Were Accepted by the Lessees in Good Faith. Properly Construed, These Conditions Do Not Require the Cancellation of the Restrictive Notes Here Involved. Their Acceptance Did Not Constitute Consent by the Atlantic Coast Line Railroad Company to the Future Short-Hauling of its System Lines by Routes Thereafter to be Established Over a Line of Railroad Not Then in Existence, and Not Now Connecting With or Reached by the Line of the Clinchfield.

(This Covers Assignments 1, 2, 3, 4, 5, 6, and 12, and Points 1, 2, and 5.)

II.

As Construed by the Commission, and the District Court, Conditions 3 and 4 are in Conflict with the Findings in the Lease Case and with the Standards of the Act and are Beyond the Power of the Commission to Impose.

(This Covers Assignment 10, and Point 3.)

III.

The Failure of Atlantic Coast Line Railroad Company to Intervene, in 1926, in the Georgia and Florida Construction Case, then Pending Before the Commission, Should Not be Considered in Determining the Meaning of the Clinchfield Conditions Imposed in 1924.

(This Covers Assignment 9, and Point 4.)

IV.

The Order of the Commission, in this Case, Requiring the Cancellation of the Restrictive Routing Notes, was, in Effect, an Order Requiring the Opening of New Through Routes Without the Finding of Public Interest Required by Paragraph 3 of Section 15 of the Act.

(This Covers Assignments 7, 8, and 11, and Point 6.)

ASSIGNMENTS OF ERROR.

All the Assignments of Error (R. 150-153) are to be argued.

STATUTES RELIED ON.

The Statutes here involved are Paragraph 3 of Section 3; Paragraphs 2, 3 and 4 of Section 5; Paragraphs 3, 4 and 7 of Section 15 of the Interstate Commerce Act, and are set out in the Appendix hereto.

ARGUMENT.

I.

The Conditions in the Clinchfield Lease Case Were Accepted by the Lessees in Good Faith. Properly Construed, These Conditions Do Not Require the Cancellation of the Restrictive Notes Here Involved. Their Acceptance Did Not Constitute Consent by the Atlantic Coast Line Railroad Company to the Future Short-Hauling of its System Lines by Routes Thereafter to be Established Over a Line of Railroad Not Then in Existence, and Not Now Connecting With or Reached by the Line of the Clinchfield.

The determinative question in this case may be stated as follows:

Did the acceptance of Conditions 3 and 4 constitute a waiver by the appellants of the protection afforded them under the provisions of Section 15 (4) of the Act to Regulate Commerce, and constitute consent on the part of the Atlantic Coast Line Railroad Company that its system lines should be short-hauled as required by the report and order of the Commission and the decree of the District Court entered in this case, over future routes over a line of railroad not then in existence and not now connecting with nor reached by the lines of the Clinchfield?

In order to answer the question the Court must construe Conditions 3 and 4 of the Clinchfield lease case. The report and order of the Commission, and the decree of the District Court in the instant case both turn on the construction of these conditions. The determination of the meaning of these two conditions,

as applied to the facts of this case, will decide the controlling issue in this appeal. The conditions are in writing and the determination of the meaning of the language is a pure question of law.

In the case of *Great Northern R. Co. vs. Merchants Elevator Company*, 259 U. S., 285, the Court said:

> "When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. (291.)
>
> "Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense, and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary." (294.)

In *United States vs. Chicago, Milwaukee, etc., R. Co.*, 282 U. S., 311, the Court said:

> "The power to impose such conditions, however, is not unlimited and may not be exercised arbitrarily, or (since Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard—*Union Bridge Co. vs. United States*, 204 U. S., 364, 384-385) unless there be found substantial warrant for the conditions in the applicable standards established by the provisions of the Act relating to such securities."

The Five Conditions as Imposed by the Commission.

When the report in the lease case was made public, the applicants had to construe the five conditions (R. 91-92) which, as adopted, they had never up to that time seen, and decide whether they would accept the

lease. They had shown in their reply to Chairman Hall that they expected to set up with respect to the leased line an operating organization similar to that which they already had in effect with reference to the road between Augusta and Atlanta, Georgia, leased by them and known as the Georgia Railroad (R. 38). They therefore could accept Condition 1, which required a separate operating organization with reference to the Clinchfield. They had based their case on the necessity of the new through route which could be furnished only by constructing a line or lines between the leased line in Southwestern Virginia and the lines of the Louisville and Nashville beyond the mountains in Eastern Kentucky. They therefore had no objection to Condition 2 requiring such construction.

Condition 3. They knew that the Clinchfield was already a party to certain existing routes and that some business had moved in the past over the Clinchfield via these routes (R. 86). Their application was to lease the Clinchfield, and this involved leasing the Clinchfield in the condition in which it was at the time of the lease, with certain routes in existence. They had no purpose to discriminate in service against the traffic of connecting lines reached by the lines of the Clinchfield and moving over the leased line in such through routes after the lease was effective. They therefore could accept Condition 3, which required that there should be no such discrimination.

Condition 4. They were able to approximate the effect of the maintenance of routes via the carriers then connecting with the Clinchfield and to determine whether they could afford to accept the lease with the requirement in the lease that the said routes be main-

tained. They were therefore able to appraise the effect of and to accept Condition 4, which required the maintenance of these routes.

Condition 5 dealt with the issuance of securities, and was not objectionable.

Applicants accepted the lease subject to the conditions as imposed. This acceptance was in good faith. They are bound only by what those conditions mean, when properly construed. The conditions must be construed as consistent with the Interstate Commerce Act and with the control which was authorized.

The outstanding fact in the lease case is that the Commission authorized the acquisition by applicants there of *control* of the lines of the Clinchfield because the new through route thus alone made possible was "the major public interest involved" (R. 83) and because the Clinchfield was "not rendering the service for which it was designed and of which it is capable," and, "so long as it continues as an independent property its usefulness to the public will be circumscribed" (R. 89).

No construction of the conditions is proper in this case which negatives the control there found to be in the public interest.

Condition 1.

This condition requires the maintenance of a separate operating organization for the leased lines (R. 91). The Piedmont & Northern and Georgia & Florida argued before the Commsision in this case that Condition 1 was designed to require the waiver of the short-hauling provision of Paragraph 4 of Section 15 of

the Act, and that this condition made unlawful the restrictive notes here involved (R. 21). Manifestly, a condition requiring only a separate operating organization such as has been set up by the applicants in connection with the leased property (R. 23) could not be twisted into a consent to the indiscriminate future short-hauling here involved. Neither the Commission nor the District Court was impressed with the argument and based their findings on the construction of Conditions 3 and 4, from which alone the Commission quoted in stating its reasons for its conclusions in this case (R. 29). It is confidently submitted that Condition 1 has no bearing on this case.

Condition 3, as Proposed.

This condition, *as proposed* by Chairman Hall, in his letter of February 9, 1924, was in the following language:

> "(3) Existing routes and channels of trade and commerce heretofore established by other carriers in connection with the Clinchfield shall be preserved, existing gateways for the interchange of traffic with such other carriers shall be maintained, and the present neutrality of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway and its subsidiary, the Carolina, Clinchfield & Ohio Railway of South Carolina, shall be continued so as to permit equal opportunity for service to and from all connecting lines reached by the line of the Clinchfield Companies *without discrimination as to routing or movement of traffic which is competitive with traffic of the applicants*, or either of them, and without discrimination against such competitive traffic in arrangement of schedule." (Italics ours.)

The objections of the applicants to this condition, and Condition 4, as proposed, are fully set out in their reply to Chairman Hall, which appears in the record, Pages 53-54. The principal objection lay in the requirement in the proposed condition that the applicants should afford equal opportunity for service to and from all connecting lines reached by the Clinchfield "*without discrimination as to routing or movement of traffic which is competitive with the traffic of the applicants.*" The applicants stated that this condition so phrased might require of them a waiver of the protection afforded applicants by Section 15 (4) of the Act against short-hauling of their system lines (R. 53-54.) (Italics ours.)

Condition 3, as Adopted.

The condition was changed and re-written. The phrase "without discrimination as to routing" was eliminated and the phrase "without discrimination in service" was added, so that, as set out in the order of the Commission, and as accepted by the applicants, Condition 3, *as adopted*, reads as follows:

> "3. So far as lies within the power of the applicants, existing routes and channels of trade and commerce heretofore established by other carriers in connection with the Clinchfield shall be preserved, existing gateways for the interchange of traffic with such other carriers shall be maintained, and the present neutrality of handling traffic inbound and outbound by the Carolina, Clinchfield & Ohio Railway and its subsidiary, the Carolina, Clinchfield & Ohio Railway of South Carolina, shall be continued *so as to permit* equal opportunity for service and routing or movement of traffic which is competitive with traffic of the

applicants, or either of them, to and from all connecting lines reached by the line of the Clinchfield companies, *without discrimination in service against such competitive traffic.*" (Italics ours.)

The condition, as changed and re-written, met the principal objection of the applicants to Condition 3 as proposed.

Appellants' Construction of Condition 3.

Paragraph 3 of Section 3 of the Interstate Commerce Act reads as follows:

"(3). All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

When this is read alongside Condition 3 it is impossible to escape the conclusion that Condition 3 of the lease case and Paragraph 3 of Section 3 of the Act deal with kindred subjects. The words "so as to permit" in Condition 3 show the purpose of the condition. In the re-writing of the condition by the Commission, the words added are "without discrimination in service." With this change in the condition, and with the reference to existing routes and their

use by competitors of the Coast Line, appellants construe Condition 3 as requiring that after the lease is effective there shall be no discrimination in service by the lessees in handling over the leased line via routes and gateways existing in 1924, the competitive traffic of connecting lines reached by the lines of the Clinchfield and moving over such routes.

This construction of the condition makes it in consonance with the control authorized, which was the control of the Clinchfield in the condition in which it then was, as a party to certain routes then in existence over its lines, which routes were used at times by lines connecting with the Clinchfield and competing with the Atlantic Coast Line (R. 86). Applicants by accepting the condition, agreed that they would not discriminate in service against such use of the leased line by connecting lines reached by the Clinchfield.

Nowhere in this condition is Paragraph 4 of Section 15 of the Act referred to. Nowhere are future routes referred to. The phrase "without discrimination as to routing," which was objected to because it might require short-hauling was eliminated. Certainly, if there had been an intention to require a waiver of Section 15 (4) this purpose should have been stated in clear language.

Condition 4, as Proposed.

This condition, *as proposed* by Chairman Hall, reads as follows:

> "(4). The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic, via existing gateways of interchange, or via such gateways as may here-

after be established under authority of the Commission by means of the connecting lines which the Louisville and Nashville Railroad Company proposes to build, equally available to such other carriers, now connecting, or which may hereafter connect, with the line of the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the Clinchfield and points at and beyond the Ohio River on the one hand and points in the southeastern territory on the other, *under divisions* to be agreed upon by the applicants, or either of them, and/or the Clinchfield organization, on the one hand, and by the other participating carrier or carriers on the other, *which shall not discriminate as to rates* against such participating carrier or carriers as compared with the applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated." (Italics ours.)

Shorn of its qualifying phrases, Condition 4, as proposed by the Commission, in substance, requires:

"The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic . . . under *divisions* to be agreed upon . . . . *which shall not discriminate as to rates* against such participating carrier or carriers as compared with applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated."

The requirement that the leased line shall be used as a link under *divisions which shall not discriminate* seemed to connote and by necessary implication require the establishment of through routes and joint rates over the leased line which would short-haul the lines of the applicants.

The applicants objected to Condition 4, as proposed, stating in their reply to Chairman Hall with reference to this condition and Condition 3 that:

> "Condition No. 3 and Condition No. 4, as suggested in the letter of Chairman Hall, would require that the Clinchfield and its subsidiaries be maintained as an open route, open to all carriers connecting with the Clinchfield, 'without discrimination as to routing or movement of traffic which is competitive with traffic of the applicants, or either of them' (Condition No. 3) and upon divisions 'which shall not discriminate as to rates against such participating carrier or carriers as compared with the applicants (Lessees), or either of them' (Condition No. 4).
>
> "The obvious effect of these two Conditions would be to require of these Lessees, in their control of the Clinchfield, the abandonment of the protection afforded them by the Congressional policy as declared in Section 15, Paragraph (4) of the Act to Regulate Commerce, providing that no carrier shall be required to use substantially less than its entire line in making through routes over its line for its competitors, and this burden would be applied as a limitation upon the title that the applicants would take under the proposed lease, and would be binding upon them and their successors in such title for the full period of the life of the lease.
>
> "This Commission has held in cases too numerous to be set out that in establishing a through

route it cannot compel a carrier to include substantially less than its entire line. (Citing cases.)

"If the Conditions were imposed, it would, as indicated above, amount to a requirement by the Commission, through indirection, of a condition that it could not impose directly." (R. 53-54.)

Condition 4, as Adopted.

Condition 4 was not adopted as proposed. The word "which," in the condition as proposed, connected the word "divisions" with the words "shall not discriminate as to rates." The condition was changed and re-written. The Commission eliminated the word "which" and substituted in place thereof the word "and," thus breaking the connection between the word "divisions" and the words "which shall not discriminate," so that the condition, as adopted, reads as follows:

"4. The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic, via existing gateways of interchange, or via such gateways as may hereafter be established under authority of the Commission by means of the connecting lines which the Louisville and Nashville Railroad Company proposes to build, equally available to such other carriers, now connecting, or which may hereafter connect, with the line of the Clinchfield and its subsidiaries, as may desire to participate in through routes and joint rates between points in territory north and west of the line of the Clinchfield and points at and beyond the Ohio River on the one hand and points in the Southeastern and Carolina territory on the other, under divisions to be agreed upon by the applicants, or either of them, and/or the Clinchfield organization, on the

one hand, and by the other participating carrier or carriers on the other, *and shall not discriminate as to rates, fares and charges* against such participating carrier or carriers as compared with the applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated." (Italics ours.)

Shorn of its qualifying phrases and for the purpose of comparison, the condition, as adopted, requires:

"The applicants shall permit the line of the Clinchfield and its subsidiaries to be used as a link for through traffic . . . under divisions to be agreed upon . . . *and shall not discriminate as to rates, fares and charges*, against . . . participating carriers as compared with applicants, or either of them; the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated." (R. 91-92.)

This elimination of reference to "divisions . . . which shall not discriminate as to rates," met the principal objection of applicants to Condition 4, as proposed.

Appellants' Construction of Condition 4.

Having provided in Condition 3 against discrimination in service, the Commission in Condition 4 requires the line to be kept or maintained by the lessees as an open route equally available to all carriers connecting therewith.

Paragraph 4 of Section 5 of the Act deals with the consolidation of the railroads of the country into systems. It provides, in part, that:

> "In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained."

Appellants construe Condition 4 as designed to carry into the lease the requirements of this paragraph of Section 5 of the Act.

The only statement in the lease case *in the nature of a finding* as to the necessity for any conditions *as to routes* follows immediately after the statement of the particulars in which the control authorized will promote the public interest, and reads:

> "Without some provision, however, for its use by other carriers as a link in through routes, control of the Clinchfield by the applicants would probably result in the abandonment of *existing routes*, especially the one via Elkhorn City and Chesapeake, and would doubtless result in placing the Seaboard and other carriers of the Southeast at a disadvantage . . . ; although as to other sections of the Southeast it might improve the competitive position of the Seaboard." (R. 89.) (Italics ours.)

It is apparent here that in considering the advisability of conditions, the Commission was thinking only of "existing routes" over lines then connecting with the Clinchfield, "especially the one via Elkhorn City."

The *existing routes*, via the Clinchfield, were known at the time of the lease and are referred to in the report as follows:

> "The Clinchfield has established in connection with the Chesapeake and other connecting lines, numerous through routes and joint rates between the Southeast and the Central West. . . . The Seaboard, the Coast Line, the Norfolk & Western and the Chesapeake prefer their central and eastern Virginia gateways for traffic," etc. (R. 84.)
>
> "The route via the Chesapeake from Cincinnati to Ashland, Ky., thence southward to Elkhorn City and over the Clinchfield into the Carolinas." (R. 85.)
>
> "The evidence is that some of the routes just described are competitive as to existing routes via the Clinchfield and the Chesapeake and the Norfolk & Western on the north, and other connections of the Clinchfield on the south, that the route via Elkhorn City is a feasible route;" etc. (R. 86.)
>
> "The proposed route via the Harlan County Branch would be competitive with the existing route via Elkhorn City," etc. (R. 86.)
>
> "Existing routes via Elkhorn City," etc. (R. 87.)
>
> "Control of the Clinchfield by the applicants would probably result in the abandonment of existing routes, especially the one via Elkhorn City and the Chesapeake." (R. 89.)

With this reference to "existing routes" throughout the report and with the "connecting lines" named in the report (R. 83-84), Condition 4 summarizes its requirements as follows:

> "The intention of this provision being that the line of the Clinchfield and its subsidiaries shall be *maintained as an open route* equally available

> *to all carriers connecting with* the Clinchfield for traffic between the points designated." (R. 92.) (Italics ours.)

Mr. Commissioner McManamy, in his dissenting opinion in the lease case, says:

> "The majority have endeavored to safeguard the *maintenance of existing through routes* by attaching certain conditions to the end that the Clinchfield will be *maintained as an open route, equally available to all connections.*" (R. 97.) (Italics ours.)

It will be noted that the language referred to by Mr. Commissioner McManamy is the language which appears in Condition 4 and that the Commissioner states that this language is designed to safeguard the maintenance of existing through routes.

In considering the probative effect of such a statement in a dissenting opinion as to the purpose of the majority of the Commission, the Court said, in *Southern Pacific vs. Interstate Commerce Commission*, 219 U. S., at Pages 449-450:

> "*Manifestly, this was deemed by the Commission to be the power which was being exerted,* since Mr. Commissioner Harlan, joined by the Chairman of the Commission, dissented on the ground that the order was an exertion of a power not possessed, to give effect to a supposed equitable estoppel, and no language was inserted in the opinion to indicate to the contrary." (Italics ours.)

The only words in Condition 4 which can be claimed to require the opening of the future routes here involved are those requiring that the line shall be used as a link

for through traffic available to "carriers now connecting or which may hereafter connect with the line of the Clinchfield." Under the facts in this case, these words have no reference to the line of the Georgia and Florida which is here involved. That line did not then and does not now connect with the line of the Clinchfield. In order to make the condition apply to the Georgia and Florida, it would have to read, "carriers now connecting with the line of the Clinchfield or which may hereafter connect with a line which connects with the Clinchfield." The condition does not so read. It was not intended that the condition should require the opening of the future routes here involved. This is made clear by the language of the report itself where the Commission, after finding that the control would promote the public interest, states that unless conditions are imposed the control might result "in the abandonment of existing routes" (R. 89). It is also made clear by the language of the condition itself where the Commission gives its own interpretation of the meaning of the condition and states that the "intention" of the condition is that "the line of the Clinchfield shall be maintained as an open route equally available to all carriers connecting with the Clinchfield."

If the words are construed to mean "carriers now connecting or which may hereafter be permitted to connect," they have a definite and lawful meaning. That this is the meaning which was intended is apparent when it is borne in mind that the Commission in the condition has just referred to such gateways as may hereafter be established under authority of the Commission, by means of connecting lines which the Louisville and Nashville Railroad Company pro-

poses to build. The making of a physical connection between railways is a matter within the exclusive jurisdiction of the Commission and cannot be required unless in the public interest (*Alabama & Vicksburg R. Co., vs. Jackson & Eastern R. Co.*, 271 U. S., 244). No line could connect with the Clinchfield in the future unless it first obtained authority from the Commission to construct and to connect. This authority to construct and to connect could be given only in accordance with the powers conferred on the Commission by Congress and only in compliance with the applicable standards of the Act. The through routes via such new line could be established only in the manner prescribed by Section 15 (3) of the Act and subject to the limitations contained in Section 15 (4).

It cannot be that the Commission by the use of the words "or which may hereafter connect" intended to give absolutely and without further consideration and to every railroad thereafter to be constructed the present right to connect with the line of the Clinchfield. Much less can it be contended that by the use of these quoted words the Commission intended to go further and provide that after such future construction the new railroad should have the right to through routes over the line of the Clinchfield, regardless of whether such through routes short-haul the lines of the lessees, and yet, when followed to its logical conclusion, this in effect is the holding of the District Court in this case.

It is familiar law that when the provisions of an instrument seem in conflict, every effort must be made to reconcile them, and this must be done if reasonably possible. It is equally familiar that in

reaching such reconciliation the declared general purpose of the instrument (in this case, the lease) will over-ride any apparently conflicting meaning of a particular clause, considered literally by itself separate from the rest of the instrument, and will limit the application of any such particular clause or condition to the declared general purpose of the instrument.

In *Barrett vs. Van Pelt*, 268 U. S., 85, the Court said:

> "Being satisfied of the legislative intention, the Court will not be prevented from giving that intention effect by a too rigid adherence to the very word and letter of the statute." (90.)

In *Darby-Lynde Co. vs. Collector of Internal Revenue*, 51 Federal (2nd) 56, Circuit Court of Appeals for the Tenth Circuit, said:

> "It frequently happens that the true intention of a legislative body is not expressed by the language employed in a statute, when literally construed. In such cases, the intent of such legislative body can only be effectuated by a departure from a literal interpretation of the language employed. Where such intention is plainly discernible from the provisions of the statute when considered as a whole, the real purpose and intent of the legislative body will prevail over the literal import of the words employed. (*Holy Trinity Church vs. United States*, 143 U. S., 457; *Hill vs. American Surety Co.*, 200 U. S., 197, 203; *Jones vs. Guaranty & I. Co.*, 101 U. S., 622, 626; *Barrett vs. Van Pelt*, 268 U. S., 85, 90; *Fleischmann Const. Co. vs. United States*, 270 U. S., 349, 360; *Baltzell vs. Mitchell*, 3 Fed. (2d), 428, 430; *London & L. I. Co. vs. Smoot*, 287 Fed, 952, 956.)"

Where there are two possible constructions of a written instrument, one of which raises grave doubt as to its validity, and the other does not, the construction which avoids the doubt is proper.

Harriman vs. Interstate Commerce Commission, 211 U. S., 407, 422.

United States vs. Delaware & Hudson, 213 U. S., 366, 408.

Federal Trade Commission vs. American Tobacco Co., 264 U. S., 298, 307.

Missouri Pacific R. Co. vs. Boone, 270 U. S., 466, 471-472.

The Words "Connecting Lines Reached by the Line of the Clinchfield Companies" in Condition 3, and the Words "Carriers Connecting With the Clinchfield" in the Commission's Statement of "the Intention" of Condition 4, Mean the Lines of Railroad Named in the Lease Report With Whom the Clinchfield Interchanged Traffic.

In its report in the instant case the Commission, referring to the conditions in the lease case, said:

> "There is no warrant for the limiting of the meaning of 'connecting lines' to the direct connections of the Clinchfield. The term is commonly used in referring to the lines in general making up a through route. There is in fact no other convenient term." (R. 29.)

This holding by the Commission, affirmed by the District Court, cannot be justified. The words "connecting lines" appear only in the phrase in Condition 3, reading: "connecting lines *reached by* the line of the Clinchfield companies." The words "reached by" have the same meaning in the condition that they have

in the lease report where the Commission states that the only ports between Norfolk and New Orleans not "reached by" the lines of the Coast Line-Louisville and Nashville system are Georgetown, South Carolina, and Fernandina, Florida (R. 89). The lines *reached by* the line of the Clinchfield are those with whom it interchanges business, and these are the Chesapeake & Ohio, Norfolk & Western, Southern, Seaboard, Charleston & Western Carolina, and Piedmont and Northern, named in the lease report (R. 83).

The word "connect" is defined in the *Century Dictionary* as "to bind or fasten together; join or unite; conjoin; combine." "Connecting lines," standing alone, might possibly be used to include lines reached by an intermediate carrier, but "connecting lines reached by the line of the Clinchfield" may not be so construed. In like manner, the language of Condition 4, to-wit: "all carriers connecting with the line of the Clinchfield," is perfectly definite. The words here mean the same thing as the words "reached by" in Condition 3. The line of the Clinchfield is a physical thing. It has definite position. It consists of a roadbed with rails thereon and a carrier which "connects with the line of the Clinchfield" is definitely and completely described. Such a carrier has physical contact through its line or track with the line or track of the Clinchfield.

It is respectfully submitted, therefore, that the Commission and the District Court were not justified in waving aside this major limitation of Conditions 3 and 4 by the simple assertion that "connecting lines" are "lines in general making up a through route."

The Northern Pacific is located in the Northwest. It is entirely possible by using a number of intermediate carriers to get a car from the line of the Northern Pacific on to the rails of the Clinchfield, and yet no stretch within the elastic limits of the English language would justify the statement that the Northern Pacific is a "connecting line reached by the line of the Clinchfield companies" (Condition 3), or that the Northern Pacific is a carrier "connecting with the line of the Clinchfield" (Condition 4). In like manner, it is entirely possible to get a car containing traffic from the track of the Clinchfield at Spartanburg to the track of the Georgia and Florida at Greenwood, and yet no one can truthfully say that the Georgia and Florida, which terminates at Greenwood, connects with the line of the Clinchfield, which begins at Spartanburg, or that the rails of the Georgia and Florida are "reached by the line of the Clinchfield Companies."

The Commission states that the words "connecting lines" are "commonly used in referring to lines in general making up a through route. There is in fact no other convenient term." We submit that this statement is inaccurate. In the first place, the language of the conditions is not "connecting lines," but "connecting lines reached by the lines of the Clinchfield," in Condition 3, and "all carriers connecting with the line of the Clinchfield," in the statement of the intention of Condition 4. The Commission, in its report in this case, has occasion several times to refer to and describe routes over several railroads and in no case does it use the terms "connecting lines" for this description. Thus (R. 14) the Commission refers to tariffs which contain "joint through rates applying over the Greenwood Exten-

sion of the Georgia and Florida *and its connections.*" Again (R. 18), in referring to the lines of the Louisville and Nashville, there appears the statement that "these lines *and their connections* serve a large area in Southern, Southwestern and Trunk Line Territories." Again (R. 20), the Commission refers to "existing joint rates between points on the Georgia and Florida and the Seaboard *and their connections.*" There are other similar instances. In no case does the Commission use the words "connecting lines" in describing the parties to a through route, but in each case uses the word "connections."

Appellants' Construction Accords With the Law.

The construction of the conditions contended for by the appellants is in accord with the applicable standards of the Act as construed by this Court. In *United States vs. Missouri Pacific R. Co.*, 278 U. S., 269, the Court in construing Section 15 (4) said:

> "The Act does not give the Commission authority to establish all the through routes it may deem necessary or desirable in the public interest. The general language of Paragraph 3 is limited by Paragraph 4. The latter lays down the rule that, subject to specified exceptions, a carrier may not be compelled to participate in a through route which does not include substantially its entire line lying between the termini of the route. The purpose is to protect the long-haul routes of carriers." (Pages 276-277.)

By this decision of this Court the law is settled that the short-hauling inhibitions of Paragraph (4) cannot be read out of the statute by interpretation; that the plain and unambiguous language of this para-

graph "leaves no room for construction"; and that the specified exceptions to the short-hauling provisions of Paragraph (4) do not include any public interest in the rehabilitation of a financially weak railroad. Such interest as the public may have in that matter is provided for in other portions of the Interstate Commerce Act, as amended by the Transportation Act, 1920 (*Dayton-Goose Creek R. Co. vs. United States*, 263 U. S., 456; *A. C. & Y. R. Co. vs. United States* [*New England Divisions case*], 261 U. S., 184; *United States vs. Abilene & Southern R. Co.*, 265 U. S., 274).

In the case of *United States vs. Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 282 U. S., 311, where there were involved conditions imposed by the Commission in granting authority under Section 20a of the Act, this Court said:

> "The power to impose such conditions, however, is not unlimited and may not be exercised arbitrarily or (since Congress can not delegate any part of its legislative power except under the limitation of a prescribed standard—*Union Bridge Co. vs. United States*, 204 U. S., 364, 384, 385), unless there be found substantial warrant for the conditions in the applicable standards established by the provisions of the Act relating to such securities."

Paragraph 2 of Section 5 of the Act, under which the application in the lease case was made, provides that:

> "The Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall

be found by the Commission to be just and reasonable in the premises."

The similar provision in Section 20a reads as follows:

> "The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises. . . ."

The Commission is no less bound by the applicable standards of the Act in a proceeding under Paragraph 2 of Section 5 than it is in a proceeding under Paragraph 20a. Paragraph 4 of Section 15 is one of the standards. Paragraph 3 of Section 3 is another of the standards. Paragraph 4 of Section 5 is another. All of these sections stand together and are limitations on the power of the Commission.

These provisions are the standards to which lawful conditions must conform. Compare these with the so-called "test" prescribed by the Commission and by the Court below. The Commission states that "the test to be applied is that of the proper relationship between the Clinchfield as an *independent line* and its connections to and from Southeastern Territory" (R. 21). The District Court says that in cases such as this, roads handling through traffic passing over the Clinchfield are to be treated "*just as though the lease were not in existence* and the Carolina, Clinchfield & Ohio were *an entirely independent road independently operated*" (R. 141).

Who is to determine what these proper relationships are if Section 15 (4) is to be disregarded? How

are we to determine, six years after the control has been authorized and the lease executed, what the Clinchfield would do if the lease were not in existence and the Clinchfield were independent? What is the rule to be applied in any particular case in the establishment of routes over the Clinchfield? If the order of the Commission and decision of the District Court are right, then Section 15(4) of the Act is eliminated, and there is nothing left except the "test" of what the Commission, in each particular case, thinks is in the public interest, regardless of whether or not it will short-haul the Coast Line. The Commission is here seeking to make a special rule governing the Clinchfield lease, and to exercise a power which is essentially legislative. In *Prentis vs. Atlantic Coast Line*, 211 U. S., 210, the Court said:

> "Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power." (226.)

This Court, in *Harriman vs. Interstate Commerce Commission*, 211 U. S., 407, said:

> "Whether Congress itself has the unlimited power claimed by the Commission, we also leave on one side. . . . It is enough for us to say that we find no attempt to make such a delegation anywhere in the Act." (418.)

II.

As Construed by the Commission, and the District Court, Conditions 3 and 4 are in Conflict with the Findings in the Lease Case and with the Standards of the Act and are Beyond the Power of the Commission to Impose.

(a) Conflict With the Findings in the Lease Case.

(1) It was argued by the defendants in the lower Court that Condition 3 requires the maintenance of existing routes and Condition 4 requires the opening of future through routes such as are here involved, regardless of whether or not such routes short-haul the Coast Line system lines. Neither the Commission in its report in this case, nor the District Court in its opinion, construe Conditions 3 and 4 separately. The Commission holds that the purpose of the conditions was to preserve the relationships "usually and normally existing between independent railroads and those whom it serves" (R. 28-29).

The District Court quotes and adopts the reasoning of the Commission (R. 142-144), and holds that the conditions were designed to require that "in a case such as this, roads handling through traffic passing over it were to be treated just as though the lease were not in existence and the C. C. & O. were an *entirely independent road, independently operated*" (R. 141). (Italics ours). It also holds that by accepting the conditions, applicants gave their consent to the short-hauling here involved (R. 146).

This construction of the conditions entirely disregards the finding by the Commission that the public interest required "*control* of the Clinchfield by the

applicants," and that this control was authorized *because of the fact* that "the Clinchfield is not rendering the service for which it was designed and of which it is capable," and "so long as it continues as an independent line its usefulness to the public will be circumscribed" (R. 89). The construction entirely negatives control so far as concerns the use of the Clinchfield as a system line in future through routes. It requires, as a condition to the acceptance of the control found to be in the public interest, the surrender of the rights guaranteed to all carriers by railroad by Section 15 (4) of the Act.

(2) The Commission in its report in the instant case quotes from the conditions and discusses their meaning (R. 89), and the District Court adopts this construction (R. 142). In this discussion the Commission overlooks the qualifying phrases in Condition 3, which it has just quoted, and proceeds to discuss the meaning of "present neutrality" and "connecting lines," as if that were the language used, whereas the language in the condition is "present neutrality of handling traffic" and "connecting lines reached by the lines of the Clinchfield." The qualifying words in these two phrases certainly have some meaning as used in the condition. "Present neutrality of handling traffic" is not the same as "present neutrality," meaning the absence of all control. We have heretofore shown that the "connecting lines" which are "reached by the lines of the Clinchfield" are the lines named in the lease report with whom, at the time of the lease, the Clinchfield interchanged traffic (R. 83-84).

(b) Conflict With the Standards of the Act and Beyond the Power of the Commission.

The construction placed on the conditions by the District Court brings them into conflict with the Act. The conditions, as so construed, are beyond the power of the Commission to impose.

In *United States vs. Chicago, Milwaukee, St. P. & P. R. R. Co.*, 282 U. S., 311, this Court held:

> "The power to impose such conditions, however, is not unlimited and may not be exercised arbitrarily or (since Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard—*Union Bridge Co. vs. United States*, 204 U. S., 364, 384, 385, 51 L. Ed. 523, 532, 533, 27 S. Ct. 367), unless there be found substantial warrant for the conditions in the applicable standards established by the provisions of the Act relating to such securities."
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> . . . . . .
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> "The decisions rest upon a principle which is 'broader than the application thus far made of it.'"
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> . . . . . .
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> "The order in itself, being complete and self-sustaining and resting upon grounds found to be sufficient to support it, *cannot be made to depend upon submission to a collateral condition which, as we have shown, is beyond the statutory and constitutional power of the Commission to impose.* Whatever may be the general rule, we have no difficulty in concluding that, under the circumstances above recited, the principle in respect of the separability of unconstitutional conditions imposed upon a privilege granted by a State is applicable to the present order of the Commis-

sion—and for a stronger reason, since that body, unlike a State in the class of cases referred to does not possess the power arbitrarily to deny the authority here sought by the carrier." (Italics ours.)

In *Frost vs. Railroad Commission of California*, 271 U. S., 583, cited in the *Milwaukee case*, this Court held:

"There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the State possesses; and the other—the power to compel a private carrier to assume against his will the duties and burdens of a common carrier—the State does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guarantees so carefully safeguarded against direct assault, are open to destruction by the *indirect but no less effective process of requiring a surrender, which though in form voluntary, in fact lacks none of the elements of compulsion.* Having regard to form alone, the Act here is an offer to the private carrier of a privilege, which the State may grant or deny, upon a condition which the carrier is free to accept or reject. In reality, the carrier is given *no choice, except a choice between the rock and the whirlpool*—an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden.

"It would be a palpable incongruity to strike down an Act of State legislation, which by words of express divestment, seeks to strip the citizen

of rights guaranteed by the Federal Constitution, but to uphold an Act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the State threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the State, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the State in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties imbedded in the Constitution of the United States may thus be manipulated out of existence." (Pages 593-594.) (Italics ours.)

The application in the lease case was made under Paragraph 2 of Section 5 of the Act, which provides that, whenever the Commission is of opinion, after hearing that the acquisition by a carrier of control of another carrier under a lease or by the purchase of stock, or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission may approve and authorize such acquisition "under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises." The words "just and reasonable" in this section are not a grant of power, nor are they the only limitation on the power of the Commission to impose conditions. The

conditions must not only be just and reasonable, but they must be based on the applicable standards established by the Act. The grant of power to attach any conditions which the Commission deems just and reasonable in a particular case would be the grant of legislative power, which cannot be delegated.

Paragraph 3 of Section 3 deals with discrimination. Condition 3 provides that there shall be no discrimination in service by the lessees after the lease against competitive traffic moving over routes existing at the time of the lease, and so construed is within powers conferred by the Act. Paragraph 4 of Section 5 of the Act deals with the consolidation of railroads into systems and provides that in the division of railroads into such systems "competition shall be preserved as fully as possible and wherever practicable the *existing routes* and channels of trade and commerce shall be maintained." Condition 4 deals with this subject and summarizes its requirements as follows:

> " . . . the intention of this provision being that the line of the Clinchfield and its subsidiaries shall be maintained as an open route equally available to all carriers connecting with the Clinchfield for traffic between the points designated."

Future routes are provided for in Paragraph 3 of Section 15, which requires a hearing and a finding of public interest before such a route can be established. This is the only section of the Act which confers on the Commission power to establish routes. This Court has held that Paragraph 4 of this Section 15 is a definite limitation on this power of the Commission and that the purpose of Section 15 (4) is "to

protect the long-haul routes of the carriers" (*United States vs. Missouri Pacific*, 278 U. S., 269). Nowhere in the Act is the Commission given power to require as a condition to a lease found to be in the public interest the waiver of the provisions of Section 15 (4). Nowhere in the Act is the Commission given power to require the opening of future routes without compliance with the provisions of Section 15 (3). Applicants construe the conditions as intended to be within these limitations on the power of the Commission.

The District Court holds that unless precluded by the conditions of the lease the complainants would have the right to their long-hauls here involved (R. 138); that the conditions preclude this right; that this case is to be decided "just as though the lease were not in existence and the Carolina, Clinchfield & Ohio an entirely independent road, independently operated" (R. 141), and that the answer to the argument of the appellants as to the short-hauling of their lines is "that these carriers gave their consent to this when they accepted the Carolina, Clinchfield & Ohio lease" (R. 146).

The construction of Conditions 3 and 4 by the District Court is bottomed on the assumption that Paragraph 2 of Section 5 of the Act grants to the Commission unlimited power to impose in a lease case any conditions which the Commission deems just and reasonable and that the Commission is by this section empowered to require by conditions the opening of through routes without a hearing or a finding of public interest as required by Section 15 (3), not only over existing lines but over lines not then in existence, and as to such routes so opened require that

the lessee shall waive the protection afforded to all carriers by Section 15 (4) of the Act. We confidently assert that there is no such grant of power to the Commission in the Act.

The Commission is a creature of the statute. Its powers and duties are prescribed and fixed by the Act of Congress, and necessarily so, since Congress cannot delegate to the Commission legislative power except under the limitation of a prescribed standard.

In its opinion the District Court said that if the conditions were beyond the power of the Commission, "it results not that they are void and the lease unconditional, but that the lease itself is unauthorized" (R. 145). This indicates a misconception of the position of the applicants. Appellants have never contended that the conditions are void. They contend that the conditions properly construed are within the standards of the Act and impose definite obligations on the lessees. These obligations have been accepted and carefully observed from that time down to the present. Appellants contend that the conditions should not be so construed as to place them beyond the power of the Commission to impose.

III.

The Failure of Atlantic Coast Line Railroad Company to Intervene, in 1926, in the Georgia and Florida Construction Case, then Pending Before the Commission, Should Not be Considered in Determining the Meaning of the Clinchfield Conditions Imposed in 1924.

In 1926 an application was filed with the Commission in the matter of the Reorganization and Extension of Georgia and Florida Railway. The application involved the financial reorganization of the Georgia and Florida Railway, and the construction by the reorganized company of an extension of its railway from Augusta, Georgia, to Greenwood, South Carolina. A copy of the application was sent to the Atlantic Coast Line Railroad Company. The Coast Line made no reply and did not intervene in the extension case (R. 23). It was claimed by defendants before the lower Court in the argument in this case, that the failure of the Coast Line, in 1926, to appear in the extension case, and there take the same position which it has taken in this case with reference to the meaning of the conditions in the Clinchfield lease case, estops the Atlantic Coast Line from now setting up its contention. The District Court held that while the failure of the Coast Line so to appear did not operate as estoppel, nevertheless, the fact that it did not appear "*is a pertinent matter for consideration in determining the meaning of the conditions under which the Carolina, Clinchfield & Ohio lease was approved*" (R. 141). (Italics ours.)

Appellants respectfully submit that the failure of the Atlantic Coast Line Railroad Company, to appear in 1926 in the construction case has no pos-

sible bearing on the meaning of conditions imposed in 1924 in the lease case. The construction case did not involve routes, and any intervention by the Coast Line in that case for the purpose of discussing routes would have been out of place. The question there involved was whether public convenience and necessity required the construction of the extension of the Georgia and Florida. The Commission states in the instant case that in the construction case, "We did not then consider what specific through routes and joint rates thereover should be applicable" (R. 22).

Consideration of that question had no proper place in the Georgia and Florida Construction Case and could not have been considered in that case by the Commission. Had the Atlantic Coast Line appeared in the Construction Case it would not have been permitted to discuss the question of through routes, but if so it could not have made its position any plainer than it did in the reply to Chairman Hall in the lease case, filed as Exhibit 3 in this case. Certainly there was no duty on the Atlantic Coast Line to intervene in a case in order to raise a question that could not be there considered or decided, and it should not be criticised for failing to do an unnecessary and useless thing, nor can its failure to appear and protest against the granting of the certificate be considered as evidence that it had changed its position so clearly set out in the reply to Chairman Hall. It is not apparent how its failure to appear and protest the granting of the certificate in the Georgia and Florida Construction Case can be pertinent in determining the meaning of the conditions in the Clinchfield lease case.

IV.

The Order of the Commission, in this Case, Requiring the Cancellation of the Restrictive Routing Notes, was, in Effect, an Order Requiring the Opening of New Through Routes Without the Finding of Public Interest Required by Paragraph 3 of Section 15 of the Act.

The plain language of Paragraph 3 of Section 15 of the Act, provides that the Commission cannot establish a through route except after a full hearing and a finding as to public interest. Paragraph 4 of the same section provides against short-hauling without the consent of the road short-hauled. Consent by a railroad, under Paragraph 4, cannot confer on the Commission jurisdiction to establish a through route without making the finding required by Paragraph 3. *Admittedly, the Commission has not made such a finding.* Its reason for not doing so is stated in its report in this case, Exhibit 1, in the following language:

> "We are not called upon in this proceeding to require the establishment of through routes, joint rates, and divisions, as might have been required if through routes and joint rates had not been *contemporaneously established* with the opening of the Greenwood Extension. Our powers are limited by Section 15 (4) in a case where carriers seek to close existing through routes and make joint rates thereover in-applicable to the same extent as in a case where we are authorized initially to establish through routes and joint rates. This proceeding is brought under Section 15 (7), under which we must determine whether the proposed restrictions, having for their purpose *the closing of existing routes*, and of making joint rates in-applicable thereover, are justified." (R. 22.) (Italics ours.)

The facts of this case are that the opening of the Georgia and Florida extension between Augusta and Greenwood was, in schedules already applicable via appellants' lines, announced to take effect June 1, 1929 (R. 14). In the same schedules appellants published to become effective May 20, 1929, and later dates, the following restrictive routing note (R. 16):

> "The rates to, from, or via the line of the Georgia and Florida Railroad between Augusta, Ga., and Greenwood, S. C., apply in connection with Atlantic Coast Line Railroad, Charleston & Western Carolina Railway, and/or Columbia, Newberry and Laurens Railroad, only on traffic interchanged between Atlantic Coast Line Railroad or Charleston & Western Carolina Railway and Georgia and Florida Railroad at Augusta, Ga., or between Charleston & Western Carolina Railway and Georgia and Florida Railroad at Greenwood, S. C., to or from points on Georgia and Florida Railroad between Augusta, Ga., and Greenwood, S. C., not including Augusta, Ga., or Greenwood, S. C."

Restrictive notes in similar form as set out above were published in the same schedules to become effective May 20, 1929, and later dates, for account of the Georgia Railroad, Atlanta & West Point Railroad, Western Railway of Alabama, Carolina, Clinchfield & Ohio Railroad, Carolina, Clinchfield & Ohio Railroad of South Carolina, and Clinchfield Northern Railway of Kentucky (R. 16). The effect of these routing notes filed to become effective on or before June 1, 1929, was to prevent the application of the rates in said schedules to new routes that would otherwise have been automatically established upon the opening for traffic of the Georgia and Florida ex-

tension on June 1, 1929. These routing notes having been filed to become effective on or before June 1, 1929, the only way said new routes could be opened was by the cancellation of the routing notes. The order of the Commission cancelling such routing notes necessarily resulted in the opening of routes via the Georgia and Florida extension in connection with appellants' system lines. As to the restrictive routing notes filed to become effective on or before June 1, 1929, the Commission is clearly in error in stating, as per quotation above, that these through routes and joint rates had been contemporaneously established by the opening of the Georgia and Florida extension. The purpose and effect of the restrictive routing notes published before the extension was open for traffic was to prevent this result. The Commission seeks to sustain its order on the theory that the restrictive notes *closed existing routes.* The restrictive notes *prevented* the opening of future routes.

The Commission concedes that if the order opened new routes it was under statutory duty to make a finding of fact as to public interest after a full hearing under the requirements of Paragraph 3 of Section 15 of the Act. This was not done. There was no attempt to comply with the requirements of this section. It is not possible to have an existing route over a line of railroad not then open for traffic. It is not possible to close a route that never existed.

CONCLUSION.

In our argument we have given our construction of Conditions 3 and 4 as covering possible conditions that might arise, but this broad consideration is not necessary in order to decide the issues presented by this appeal. For that reason we have also given our construction of these conditions as they apply to the specific issues here raised. We respectfully submit that the meaning of Condition 3 and Condition 4 considered with reference to the specific issues raised in this case, require a reversal of the opinion of the District Court.

Condition 3.

The Greenwood extension of the Georgia and Florida was not in existence at the time these conditions were imposed by the Commission in the Clinchfield lease case. The construction of the Georgia and Florida extension was not begun until two years after the lease case was decided. Therefore the phrase "existing routes and channels of trade and commerce heretofore established by other carriers in connection with the Clinchfield," as used in Condition 3, has no possible application to a line of railroad which was not then in existence. In like manner, so far as concerns the Georgia and Florida, there were no "existing gateways for the interchange of traffic with such other carriers," as referred to in Condition 3, since this particular carrier had no line of road from Augusta, Georgia, to Greenwood, South Carolina, that might then have been used as a part of a through route reached by an existing gateway. There were no "existing routes and channels of trade and commerce" established over such line either then or there-

tofore as referred to in Condition 3. The phrase " * * * to and from all connecting lines reached by the line of the Clinchfield Companies" in Condition 3 can have no possible application whatever to the Georgia and Florida extension. Condition 3 does not fit the facts of this case.

Condition 4.

This brings us to a consideration of Condition 4 as applied to the facts and issues of this case. The Georgia and Florida extension not then being in existence, cannot be covered by the language of Condition 4 which limits the condition to "such other carriers, now connecting, or which may hereafter connect with the line of the Clinchfield and its subsidiaries." A line not then in existence could not then connect with the Clinchfield. Since the line when constructed ended at a point eighty-nine miles from the line of the Clinchfield, it is equally obvious that the words "or which may hereafter connect with the line of the Clinchfield and its subsidiaries," as used in this condition, can have no application to the Greenwood extension of the Georgia and Florida even when completed. This line does not come within the purview of the phrase "now connecting" nor within the phrase "which may hereafter connect." Whatever may be the meaning of Condition 4 as to a line "which may hereafter connect," it is too plain to admit of argument that it has no application whatever to the Georgia and Florida extension which did not then connect and does not now connect with the line of the Clinchfield and its subsidiaries.

The District Court construes these words as meaning now connecting or which may hereafter connect

via an intermediate line of railroad that does in fact connect with the Clinchfield. This construction cannot be sustained under either the spirit or the letter of the condition. It requires the writing into the condition of words that were not used and creates obligation far beyond the meaning of the words that actually were used. In fact, such a construction would throw the Clinchfield open to every line of railroad in the continental United States, because if these words mean lines connecting through another line or lines that ultimately may connect with the Clinchfield, there is no limitation that could be imposed on the comprehensive scope of the condition thus construed. Obviously, the Commission could not have intended that such a meaning should be attached to these conditions.

Respectfully submitted,

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M. G. MCDONALD,
CARL H. DAVIS,
Solicitors for Appellants.

Wilmington, N. C.,
October 26, 1931.

APPENDIX.

Section 3 (3):

"All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper."

Section 5 (2):

"Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers, either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises."

Section 5 (3):

"The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1) or (2), as it may deem necessary or appropriate."

Section 5 (4):

"The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties."

Section 15 (3):

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property, or the maxima or minima, or maxima and minima, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares and charges applicable thereto), and the division of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated; and this provision, except as herein otherwise provided, shall apply when one of the carriers is a water line. The Commission shall not, however, establish any through route, classification, or

practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character; nor shall the Commission have the right to establish any route, classification, or practice, or any rate, fare, or charge, when the transportation is wholly by water, and any transportation by water affected by this Act shall be subject to the laws and regulations applicable to transportation by water."

Section 15 (4):

"In establishing any such through route the Commission shall not (except as provided in Section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established: *Provided*, That in time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

Section 15 (7):

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision

may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

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No. 88

In the Supreme Court of the United States

OCTOBER TERM, 1931

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, AND CHARLESTON & WESTERN CAROLINA RAILWAY COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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